INFORMATION

FOR

ROBERT ROBB First Magiſtrate of the Burgh of *Weſter Anſtruther*, with Concourſe of his MAJESTY's Advocate, for his MAJESTY's intereſt, Proſecutor,

AGAINST

GABRIEL HALLADAY Schoolmaſter in *Weſter Anſtruther*, Pannel.

THE libel againſt this pannel charges him with the crime of perjury. The major propoſition is laid as well on the common law, as on a ſtatute of Queen Mary, wherein the puniſhment inflicted by the common law is defined; and the minor propoſition, after charging the commiſſion of perjury, in the emiſſion of a particular oath in general, points out ſundry particulars of that oath, whereby, in a more eſpecial manner, it appears perjury has been committed; the concluſion is in the uſual form, *viz.* That on trial and conviction, puniſhment ought to be inflicted on this pannel.

At the diet of compearance in the criminal letters, the pannel appeared at the bar, he pleaded not guilty to the libel, and referred his further defence to his counſel. A variety of objections have been uſed to the form and relevancy of the libel, on which pretty long pleadings enſued in court; the reſult of which has been, that your Lordſhips have ordered informations, and this is humbly offered on the part of the proſecutors.

The firſt objection to this libel pleaded for the pannel, was to the major propoſition, which, it was contended, was laid on a wrong

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ſtatute, and one that no way related to the matter in iſſue. That the libel proceeded to charge the pannel with emitting a falſe depoſition in the courſe of a proceſs; and that that crime was not puniſhable by the ſtatute libelled on, but by the 47 ſtatute of the ſixth parliament of Queen Mary, intitled "Anent puniſhment of falſe witneſſe," which ſtatute is conceived in the following terms: "*Item*, It is ſtatute "and ordained, quhair ony witneſſe deponis falſelie, or ony manner of "perſonne or perſonnes inducis them to bear falſe witneſſe, That all "ſick perſonnes in times coming be puniſhed be pearſing of their "tongues, and eſcheating of all their gudes to our Soveraine Ladies uſe; "and declared never to be able to bruck honour, office, or dignitee "fra thenefarth, and furder puniſhment to be maid in their perſones, "at the ſight and diſcretionne of the Lordes, according to the quality "of the fault."

The anſwer given to this objection, and which the memorialiſt is adviſed is a ſolid one, was, That this libel is founded upon the common law, rather than upon any particular ſtatute; for the ſtatute of Queen Mary, mentioned in the major propoſition, does not enact any new puniſhment for the crime of perjury, but ſimply declares what the puniſhment by the common law was, and only extends the crime ſo as to comprehend bigamy under the denomination of perjury, and to render it puniſhable as ſuch; and as the ſtatute mentioned in the libel does not derogate from the common law, but in fact declares the puniſhment which may be inflicted by it, ſo neither does the act of the ſixth parliament of Queen Mary derogate from the other. It in reality inflicts the ſame puniſhment, with ſome additions; confiſcation of moveables, and *infamia juris* are mentioned in both ſtatutes as a part of the puniſhment. The ſtatute of the fifth parliament of Queen Mary adds to this, impriſonment for year and day, and longer at the pleaſure of the Queen, which, in the language of law, means the pleaſure of the courts of juſtice. The ſtatute of the ſixth parliament of Queen Mary permits the ſame thing, under the name of farther puniſhment, to be made in their perſons at the ſight and diſcretion of the Lords, according to the quality of the fault. The difference then between the two ſtatutes, is only this, that the ſtatute of the ſixth parliament

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of Queen Mary adds the puniſhment of peircing the tongue to the puniſhment inflicted by the common law.

As therefore the common law is not abrogated, but remains in full force, the ſtatute laſt mentioned notwithſtanding; ſo this libel, which is laid on the common law, is properly laid; and muſt be relevant in ſo far as the puniſhment of the common law goes: And further than this, the proſecutor did not intend it ſhould be carried.

Againſt the minor propoſition of this libel, various objections have been ſtarted. The firſt one was, That it is deficient in this, that the libel does not bear, that the pannel emitted falſehoods judicially on oath, *knowing them to be falſe*: That he might, thro' error or miſtake, have affirmed a thing to be true which he really believed to be ſo, altho' it was falſe: That an error of this kind could not be called perjury; as the libel therefore is defective in charging, that he knew the falſehood of what he affirmed; ſo it is not relevant to infer the crime of perjury.

But, in anſwer to this, it may be obſerved in the *firſt* place, That in the minor propoſition, the pannel is explicitely charged with the crime of perjury, in the following words: "YET TRUE IT IS AND "OF VERITY, That the ſaid *Gabriel Halladay* is guilty actor, art and "part, of the crime of perjury." As the technical term of perjury is made uſe of, and that includes both the *animus* and the act; ſo there was no occaſion for going any farther. It would have been ſuperfluous in the libel, had intention been charged over and above the guilt of perjury. It is ſufficient to charge, if a man has committed a crime known in the law; for in ſuch a charge the criminal intention is included, as there can be no crime without an intention. The pannel therefore being charged with perjury, it is implied, that he wilfully averred falſehoods upon oath, knowing them to be ſuch.

But, in the *ſecond* place, Though this technical term of perjury had not been made uſe of; although no more had been charged, than that the pannel affirmed falſehoods judicially on oath; it would have been preſumed that he did ſo intentionally, knowing them to be falſe; for, unleſs this was preſumed from the act, it would be impoſſible to convict any perſon of perjury. If the pannel alledges,

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he was miſtaken as to matter of fact, that is a defence which it is incumbent on him to prove. He muſt ſhow to the court, how it was he came to be miſtaken; and, unleſs he does ſo, he muſt be held guilty of the crime, upon its appearing that he actually affirmed what was falſe.

There was no occaſion, therefore, to ſet forth in the libel, That the pannel knew what he affirmed to be falſe. The charge is complete as it ſtands, and will remain ſo, unleſs elided by the defences of the pannel in point of fact, which he muſt prove before he can avail himſelf of them.

The *ſecond* objection againſt the minor propoſition of this libel is, That from the manner in which the libel is made, and the liſt of witneſſes, it appears, that it is the intention of the proſecutor to prove the crime of perjury againſt the pannel, by the depoſition of witneſſes: That this is an inhabile mean of proof; in the crime of perjury, the depoſition of one witneſs being as good as the depoſition of another witneſs. But there is an abſurdity in ſuppoſing the crime of perjury may be proved by witneſſes; for, if once this is received as a principle, there would be no end of trials: If witneſſes were received againſt the pannel to convict of perjury, theſe might again be convicted by other witneſſes; and ſo on *in infinitum*: That it had been found by deciſions of the court, that the crime of perjury cannot be proved by witneſſes; and for this, reference was made to a caſe, Balcanqual *contra* Rigg, mentioned by Sir George M'Kenzie, tit. *Perjury*, ſection 5. as decided on the day of 1677.

If this objection was to be received againſt indictments for perjury, the evident tendency of it muſt be, to beſtow impunity on all who are guilty of that crime; for, unleſs a proof by witneſſes is permitted, it is very rarely that perjury can be proved at all; and yet perjury is a crime the moſt pernicious in its conſequences to ſociety of any that can be figured; at the ſame time, that it involves much moral turpitude and impiety. Our laws cannot be ſuppoſed to beſtow impunity on a crime of ſo deep a dye; from the very conſequence therefore that muſt follow, one might ſafely argue, that the

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law cannot ſtand as the pannel would have it; but that, on the contrary, it is neceſſary for the well-being of ſociety, that the crime of perjury ſhould be proved by witneſſes.

But further; it is a point that has long ago been decided, That the mode of proof, in the crime of perjury, is not confined to writings; but that parole-evidence muſt be received. Thus Balfour, in his Practics, title, *Of probation by witneſſes*, chapter 29. tells us, " Gif witneſſis ſweir and depone in judgment aganis ony partie quha thairefter raiſis ſummoundis aganis thame, to heir thame decernit purjure and menſworn, he may preive the ſamin be witneſſis, and ſall not be compellit to the probatioune thaireof be writ;" 6th April 1565, the Laird of Roſſy *contra* Lord Innermeith's witneſſes.

And indeed, the records of this court prove the contrary doctrine to that which is maintained by the pannel; for the proſecutor will venture to affirm, that, in trials for perjury in this court, witneſſes have been received to prove the crime; and within theſe few years, there have been more than one inſtance of trials of this kind. As to the deciſion founded on, as quoted by M'Kenzie, it is remarkable, it ſtands blank as to the month, tho' not to the year; and no ſuch caſe is to be found in the whole year 1677.

The pannel's counſel argued, That, in the depoſition he had emitted, on account of which he is now charged with the crime of perjury, he was ſupported by other witneſſes in the various articles; and they contended, that, as the depoſition of two witneſſes makes a complete proof, ſo where two witneſſes depone to the ſame fact, no challenge for perjury can lie.

How far the pannel has been ſupported by other witneſſes, in the civil proceſs, or how far he can ſtill inſtruct the verity of what he has depoſed to, by witneſſes he may bring in exculpation, is not *hujus loci*. For the proceſs in which he emitted that oath, cannot be brought under the conſideration of the court in this trial; and what the pannel propoſes to prove by witneſſes in this trial, muſt be reſerved to the conſideration of the jury. Upon inquiry, perhaps, it might be found, that the pannel has no reaſon to ſay, his depoſition is in the leaſt ſupported by the teſtimony of other witneſſes who have been examined in that proceſs in

which he emitted his depoſition. This, however may be ſaid, that it is impoſſible it can afford a defence againſt perjury, that more than one witneſs has ſworn to the ſame thing; for it never can leſſen the guilt, that there are many accomplices in the crime; on the contrary, the more actors there have been, the more highly aggravated it becomes: And indeed, was the principle pleaded by the pannel true, nothing would be more eaſy than for every perſon guilty of perjury to ſcreen himſelf from puniſhment, by procuring an accomplice in his guilt.

It was alſo objected to this libel, That the trial was brought during the dependence of the action before the Court of Seſſion, in which the oath was emitted: it was contended, That if perjury was here committed, it had been committed in a proceſs depending in a court that was itſelf competent for trial of the crime; that therefore an incidental complaint to that court was the proper remedy: And the counſel for the pannel went ſo far as to argue, that it was a ſort of diſreſpect to, and contempt of the authority of the Court of Seſſion, to bring a trial in this court for perjury committed there.

But, however competent it may be for the Court of Seſſion to inflict cenſures, or ſlighter puniſhments, on crimes or miſdemeanours appearing to them in the courſe of their procedure; certain it is, that the proper juriſdiction for trial and puniſhment of crimes is veſted in the Court of Juſticiary; and tho', if from the proceedings concerning the elections of Weſter Anſtruther, it appeared to that court, that this pannel had ſworn falſely, they would inflict a puniſhment on him; yet, when it was propoſed to eſtabliſh his guilt by other evidence than what was given in the courſe of thoſe proceedings, ſo that a ſeparate action became neceſſary, the Court of Juſticiary was the only proper court in which ſuch an action could be brought, and a complaint to the Court of Seſſion would have been altogether incompetent.

As therefore this was the only proper court in which the preſent proſecution could be brought; ſo the bringing of it in this court can never be reputed diſreſpectful to the Court of Seſſion. Neither has

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that court looked on it in this view: For, upon an application made to them, they gave an order for tranſmitting the principal depoſition of the pannel, from the proceſs in dependence before them, to this court, in order that it might be uſed as evidence againſt him in the preſent proſecution; an order which they would never have granted, had they either thought their juriſdiction was impinged on, or any thing diſreſpectful towards them committed by the preſent proſecution.

It was objected againſt this libel likeways, That the perſons who are mentioned therein are not particularly deſcribed; that this ought to have been done, before it can be ſhown that the pannel hath committed perjury in any thing he hath depoſed with reſpect to thoſe perſons; that ſuch particular deſcription not having been given, the libel is defective, and muſt fall to the ground.

But to this it is anſwered, That the depoſition of the pannel is referred to in the libel: That, upon peruſing that depoſition, it will be found, that the ſeveral perſons concerning whom the pannel depones, are deſcribed in ſuch a manner, that there can be no doubt about them: That the proſecutor muſt bring home his proof to theſe very perſons, before he can convict the pannel; and the application of that proof, is a matter that muſt be judged of by the jury after the proof is led: This objection therefore is not *hujus loci*.

It was further objected, That this trial ought not to proceed, while the civil action concerning the elections of Weſter Anſtruther was in dependence, being, in ſome ſort, connected therewith; it was inſinuated, that the intention of this action was to make it a kind of prejudicial action to that proceſs; and therefore that proceſs ought to be ſiſted in this proſecution, till ſuch time as a ſentence ſhall be pronounced in the other.

This objection, however, the proſecutor fully anſwered. He diſclaimed all intention or inclination of connecting this proceſs in the leaſt with the deciſion of the civil proceſs relative to the elections of Weſter Anſtruther; and he conſented, that the diet in this proſecution ſhould be continued to ſuch a diſtant day as it might be expect-

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ed that civil proceſs ſhould have received a determination. This muſt put an end to all complaints or objections of the pannel on that head; tho' it truly does not occur, what intereſt he can have, whether this is intended as a prejudicial proceſs to that relative to the elections of Weſter Anſtruther or not, unleſs he will acknowledge a cloſſer connection with the politics of that borough than one would expect he would do in the predicament in which he now ſtands.

An objection was likewiſe ſtarted to the title of the proſecutor, becauſe he is here inſiſting with the concourſe of the King's Advocate only, and not aided by his inſtance; and it was thrown out, that under theſe circumſtances he had no title to proſecute. Much argument, however, ſhall not be uſed on this head; becauſe the caſe does not ſeem to ſtand in need of it. Perjury is undoubtedly a public crime; and was there a neceſſity to argue the general point, it might be ſhown, notwithſtanding commonly received prejudices to the contrary, that every public crime may be proſecuted by individuals who are ſubjects of Scotland, not only without the inſtance, but even without the concourſe of the King's Advocate; and this doctrine could be ſupported, not only by general principles, but by the deciſions of this court. In the preſent caſe, however, the direct tendency of the perjury that has been committed, has been to hurt the proſecutor in his civil rights and patrimonial concerns; now it never has been doubted, that where a private perſon is affected in his rights by the conſequences of a public crime, he has a right to proſecute ſuch crime *ad vindictam*, with the concourſe of the King's Advocate; if the crime is of a private nature, it cannot be proſecute without him, even at the inſtance of the King's Advocate.

Upon the whole, as the libel is laid, the proſecutor apprehends it is abundantly relevant, that no good reaſon hath been aſſigned, why it ſhould not paſs to the knowledge of an aſſize.

In reſpect whereof, &c.

ANDREW CROSBIE.